Plastech Industrial Systems Sdn Bhd v N&C Resources Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22IP-49 OF 2009
UMI KALTHUM J
12 JULY 2013

Civil Procedure — Contempt of court — Committal proceeding — Judgment and order — Application to set aside ex parte order — Service of judgment and order — Whether served personally on third defendant — Whether third defendant had constructive knowledge of judgment and order — Whether established — Rules of Court 2012 O 32 r 6, O 45 r 7(7), O 52 rr 3 & 4

The third defendant applied to set aside the ex parte order and the notice of application (encl 36A) insofar as it relates to the third defendant. In the above case, the learned High Court judge had given judgment in favour of the plaintiff against first, second, third and fourth defendants for breach of the plaintiffs copyright in some photographs and catalogues, amongst others ('the judgment'). Further, the learned judge gave another order in favour of the plaintiff against the same defendants namely that the mould was to be placed with a third party to be mutually agreed by the parties; the costs of the storage was to be borne by the plaintiff with liberty to the plaintiff to apply to recover the storage costs of the mould should the appeal be dismissed (the order). The defendant's appeal was dismissed by the Court of Appeal. The plaintiff filed an ex parte application for leave to commence committal proceedings against all the defendants for their failure to comply with para 2(a)–(d) of the judgment and the order granted by the court. The third defendant then filed an application to set aside the ex parte order on the following two grounds: (a) the plaintiff had failed to serve the judgment and the order personally on the third defendant; and (b) the plaintiff had failed to highlight to this court that the judgment and order were not served personally on the third defendant when the ex parte order was sought for and granted.

Held, dismissing the third defendant's application with costs:

(1) The third defendant had constructive knowledge and notice of the terms of the judgment and order notwithstanding that the same were not served on the third defendant personally. The third defendant's constructive knowledge of the same was evinced by the fact that he and the other defendants had formally applied for a stay of the judgment. In support of the defendants' application for a stay, the third defendant had affirmed an affidavit on behalf of himself and the other defendants whereby the third

defendant had sworn on oath in para 5.1(1)–(6) setting out the whole terms of the judgment verbatim. Further, the third defendant at all material times was represented by solicitors and must have been given legal advice on every step of these proceedings (see paras 9–10).

(2) The third defendant had waived his right to object to the ex parte order by his own action. This was because the third defendant had proceeded to file two affidavits in encls 63 and 71 to oppose the plaintiff's application for committal proceedings in encl 36A. There was no objection raised by the third defendant, that the plaintiff had failed to serve the judgment and the order personally on him. The third defendant had also failed to inform the court during case management in respect of the encl 36A application that the third defendant intended to file this application to set aside the ex parte order. Moreover, O 45 r 7(7) of the Rules of Court 2012 permits the court to dispense with service of a copy of an order under this rule if it thinks it just to do so. In this instance, the personal service of the judgment and the order on the third defendant was dispensed with in view of the third defendant's obvious earlier knowledge of them when he had affirmed his affidavit date (see paras 11–12).

[Bahasa Malaysia summary

Defendan ketiga memohon untuk mengetepikan perintah ex parte dan notis permohonan (lampiran 36A) setakat yang ia berkaitan dengan defendan ketiga. Dalam kes di atas, Yang Arif hakim Mahkamah Tinggi telah memberikan penghakiman yang memihak kepada plaintif terhadap defendan pertama, kedua, ketiga dan keempat kerana melanggar hak cipta plaintif dalam beberapa gambar-gambar dan katalog, antara lain ('penghakiman'). Selain itu, Yang Arif hakim memberikan perintah yang lain yang memihak kepada plaintif terhadap defendan yang sama iaitu bahawa acuan tersebut akan diletakkan dengan pihak ketiga yang akan dipersetujui bersama oleh pihak-pihak; kos penyimpanan itu akan ditanggung oleh plaintif dengan kebebasan kepada plaintif untuk memohon mendapatkan kos penyimpanan acuan sekiranya rayuan ditolak (perintah). Rayuan defendan telah ditolak oleh Mahkamah Rayuan. Plaintif memfailkan permohonan ex parte bagi kebenaran untuk memulakan prosiding komital terhadap semua defendan kerana kegagalan mereka untuk mematuhi perenggan 2(a)-(d) penghakiman dan perintah yang diberikan oleh mahkamah. Defendan ketiga kemudian memfailkan permohonan untuk mengetepikan perintah ex parte dengan kedua-dua alasan yang berikut: (a) plaintif telah gagal untuk menyerahkan penghakiman dan perintah itu secara kediri kepada defendan ketiga; dan (b) plaintif telah gagal untuk memaklumkan kepada mahkamah bahawa penghakiman dan perintah tidak disampaikan kepada defendan ketiga apabila perintah ex parte telah dipohon dan diberikan.

Diputuskan, menolak permohonan defendan ketiga dengan kos:

(1) Defendan ketiga mempunyai pengetahuan penuh dan notis terma

penghakiman dan perintah walaupun yang sama tidak disampaikan kepada defendan ketiga secara kediri. Pengetahuan penuh defendan ketiga terbukti oleh fakta bahawa dia dan defendan lain telah secara rasmi memohon penangguhan penghakiman. Dalam menyokong permohonan defendan untuk penginapan, defendan ketiga telah mengesahkan afidavit bagi pihak dirinya dan defendan lain yang mana defendan ketiga telah bersumpah di perenggan 5.1 (1)–(6) yang menyatakan terma keseluruhan penghakiman itu kata demi kata. Di samping itu, defendan ketiga pada semua masa material telah diwakili oleh peguam dan telah diberi nasihat undang-undang tentang setiap langkah prosiding tersebut (lihat perenggan 9–10)

(2) Defendan ketiga telah mengetepikan haknya untuk membantah perintah ex parte oleh tindakan sendiri. Ini kerana defendan ketiga telah meneruskan untuk memfailkan dua afidavit dalam lampiran 63 dan 71 untuk menentang permohonan plaintif untuk memulakan prosiding pengkomitan di lampiran 36A. Tiada bantahan yang dibangkitkan oleh defendan ketiga, bahawa plaintif telah gagal untuk menyerahkan penghakiman dan perintah secara kediri. Defendan ketiga juga gagal memaklumkan mahkamah semasa pengurusan kes berkenaan dengan permohonan lampiran 36A bahawa defendan ketiga bertujuan untuk memfailkan permohonan ini untuk mengetepikan perintah ex parte. Selain itu, A 45 k 7(7) Kaedah-Kaedah Mahkamah 2012 membenarkan mahkamah untuk mengetepikan penyampaian salinan sesuatu perintah di bawah kaedah ini jika difikirkan adil untuk berbuat demikian. Dalam hal ini, serahan kediri penghakiman dan perintah tersebut kepada defendan ketiga telah diketepikan memandangkan pengetahuan penuh defendan ketiga mereka apabila dia telah mengesahkan tarikh afidavitnya (lihat perenggan 11–12).]

Notes

For cases on committal proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2036–2070.

Cases referred to

Madlis bin Azid & Ors v Chua Yung Kim & Ors [2013] 2 CLJ 110, HC (refd)

Legislation referred to

Rules of Court 2012 O 32 r 6, O 45 rr 5, 7(7), O 52 rr 3, 4

Justin TY Voon (Lee Chooi Peng with him) (Justin Voon Chooi & Wing) for the plaintiff.

Clinton Nicholas Gomez (Rajinder Singh Veriah & Co) for the first and fourth defendants.

Victoria Loi Tien Fen (Shook Lin & Bok) for the third defendant.

Umi Kalthum J:

THE APPLICATION

[1] The third defendant applied in encl 72 and which was filed 18 April 2013, pursuant to O 32 r 6 read together with O 45 rr 5 and 7 and O 52 rr 3 and 4 of the Rules of Court 2012 for the following orders:

(a) that the ex parte order dated 9 August 2012 be set aside forthwith insofar as it relates to the third defendant;

(b) that consequently, the notice of application dated 22 August 2012 encl 36A be struck out insofar as it relates to the third defendant; and

(c) costs.

THE FACTS

[2] On the 6 October 2011, the learned judge Dato' Azahar bin Mohamed had given judgment in favour of the plaintiff against the first, second, third and fourth defendants for breach of the plaintiff's copyright in some photographs and catalogues, amongst others ('the judgment'). Further, on 25 November 2011, the learned judge gave another order in favour of the plaintiff against the same defendants wherein the learned judge ordered that the mould is to be placed with a third party to be mutually agreed by the parties; the costs of the storage will be borne by the plaintiff with liberty to the plaintiff to apply to recover the storage costs of the mould should the appeal be dismissed ('the order'). The defendant's appeal was dismissed on 17 May 2012 by the Court of Appeal.

[3] The plaintiff filed an ex parte application for leave to commence committal proceedings against all the defendants vide encl 44 on 19 June 2012. The defendants were alleged to have failed to comply with para 2 (a)–(d) of the judgment dated 6 October 2011 and order dated 25 November 2011. As such it was alleged that the defendants were in contempt of the same judgment and order.

[4] On 9 August 2012, the court granted leave to commence committal proceedings against all the defendants for contempt of the court's judgment and order ('the ex parte order').

[5] On 22 August 2012, the plaintiff filed the substantive application for contempt of court vide encl 36A.

[6] On 18 April 2013, the third defendant filed this encl 72 to set aside the ex parte order. The third defendant stated two grounds in support of this application, they are:

(a) the plaintiff had failed to serve the judgment and the order personally on the third defendant; and

(b) the plaintiff had failed to highlight to this court during hearing on 9 August 2012 that the judgment and order were not served personally on the third defendant when the ex parte order was sought for and granted.

THE DECISION

[7] I dismiss the third defendant's application with costs at RM3,000 which shall be paid within three weeks from 12 July 2013. I do so for the following reasons.

[8] The third defendant had constructive knowledge and notice of the terms of the judgment dated 6 October 2011 and order dated 25 November 2011 notwithstanding that the same were not served on the third defendant personally.

[9] The third defendant's constructive knowledge of the same is evinced by the fact that he and the other defendants had formally applied for a stay of the judgment vide summons in chambers dated 13 October 2011. In support of the defendants' application for stay of the same, the third defendant had affirmed an affidavit dated 13 October 2011 on behalf of himself and the other defendants whereby the third defendant had sworn on oath in para 5.1(1)–(6) setting out the whole terms of the judgment verbatim.

[10] Further, the third defendant at all material times was represented by solicitors and must have been given legal advice on every step of these proceedings.

[11] I agree with learned plaintiff solicitor's submission that the third defendant's encl 72 application is an afterthought. It would appear this application was filed to delay the committal proceedings against the third defendant in encl 36A. By the third defendant's own action I find that he had waived his right to object to the ex parte order dated 9 August 2012. This was because the third defendant had proceeded to file two affidavits in encls 63 affirmed on 23 January 2013 and 71 affirmed on 2 March 2013 to oppose the plaintiff's application for committal proceedings in encl 36A. I find that there

was no objection raised by the third defendant that the plaintiff had failed to serve the judgment and the order personally on him. The third defendant had also failed to inform the court during case management dated 29 January 2013 and 4 March 2013 in respect of encl 36A application that the third defendant intended to file this application to set aside the ex parte order.

[12] Moreover, O45 r 7(7) of the Rules of Court 2012 permits the court to dispense with service of a copy of an order under this rule if it thinks it just to do so. In this instance, I am of the view that personal service of the judgment and the order on the third defendant is dispensed with in view of the third defendant's obvious earlier knowledge of them when he had affirmed his affidavit dated 13 October 2011 (see *Madlis bin Azid & Ors v Chua Yung Kim & Ors* [2013] 2 CLJ 110).

Third defendant's application dismissed with costs.

Reported by Ashgar Ali Ali Mohamed